Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/25867/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 September 2018	**On 28 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

FAISAL [S]
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Rahman of Taj Solicitors
For the Respondent: Ms K Pal of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant, Faisal [S] is a citizen of Bangladesh born on 1 February 1989. In October 2009 he entered with leave as a student which was extended to expire on 28 September 2014. He met [KB] and their child was born on [~] 2012. On 28 September 2013 they married and the Appellant was granted leave to remain as a spouse until 16 October 2016. In time, he applied for further leave as a spouse.

The SSHD's Original Decision

2. On 8 November 2016 the Respondent refused the Appellant further leave. He had fraudulently obtained a TOEIC certificate from Educational Testing Service (ETS); he did not meet the financial requirements of Appendix FM to show a minimum income of £18,600; he did not meet the eligibility and suitability requirements and so his relationship with his child could not engage EX.1 of Appendix FM.

3. The Appellant did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules and there were no very significant obstacles to his re-integration into Bangladesh where he had lived for some twenty years and obtained a university degree before coming to the United Kingdom. There were no exceptional circumstances to warrant the grant of leave under Article 8 of the European Convention outside the Immigration Rules.

Proceedings in the First-tier Tribunal

4. On 22 November 2016 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are lengthy, asserting the Appellant's TOEIC certificate was not obtained by fraud; that the Appellant should have been given the opportunity to obtain an employer's letter prior to the decision being made and there were insurmountable obstacles to his family life continuing in Bangladesh. The Respondent had not adequately considered the best interests of his British citizen child and that his wife had no connection to Bangladesh.

5. By a decision promulgated on 26 March 2018 Judge of the First-tier Tribunal Froom dismissed the appeal.

6. On 23 July 2018 Judge of the First-tier Tribunal Shimmin granted the Appellant permission to appeal on the grounds it was arguable the Judge had erred by:

   - failing to comply and consider Section EX .1
   - failing to give adequate reasons to support his finding there were no insurmountable obstacles to the Appellant returning to Bangladesh with his wife and child
   - failing to make a finding about the Appellant's private life and the obstacles to his re-integration into Bangladesh
   - failing to assess the Appellant's exceptional circumstances
   - failing properly to consider the proportionality of the decision
   - failing properly to consider the best interests of the Appellant's child.

Proceedings in the Upper Tribunal

7. The Appellant together with his wife and his mother attended the hearing. I explained the purpose and procedure to be followed and the Appellant confirmed

his address but otherwise neither he nor his wife took any active part in the proceedings.

Submissions for the Appellant

8. Mr Rahman submitted that the Appellant had established a private and family life in the United Kingdom and that his wife and child could not follow him to Bangladesh because there would be very significant obstacles to their integration there. The Judge had accepted that family life had been established. The decision to remove the Appellant was disproportionate.

9. Mr Rahman referred me to the hospital letter of 8 February 2018 in the Appellant's bundle (AB) at pp.123-124 about the Appellant's wife's idiopathic intracranial hypertension. I enquired whether there was any background evidence what medical facilities were available in Bangladesh. He stated that a two-page extract from the Internet had been handed up at the hearing before Judge Froom but he did not have a copy and I could not find a copy in the Tribunal file.

10. He referred me to what the Judge had stated at paragraph 50 of his decision and submitted that although the medical evidence may show there were no insurmountable obstacles in relation to medical treatment, the Appellant's wife would not receive care of the same calibre as she would in the United Kingdom. She had could not live in Bangladesh. The six grounds identified in the grant of Permission to Appeal had been established and the decision should be set aside.

Submissions for the Respondent

11. Ms Pal submitted the Judge had correctly set out the law at paragraph 33 of his decision and at paragraphs 47ff. had referred to Section EX.1. At paragraphs 48-50 the Judge had given reasons why the Appellant's wife might be unwilling to go to Bangladesh and had considered the meaning of insurmountable obstacles in Section EX.2. He had noted the wife was not currently receiving medical treatment and concluded that they were no insurmountable obstacles to her and the Appellant with their child continuing the family life in Bangladesh.

12. He had dealt with the best interests of their child and the reasonableness of expecting the child to leave the United Kingdom at paragraphs 53-56 and assessed the public interest and relevant factors identified in s.117B of the 2002 Act. There was no error of law in the decision which should stand.

Response for the Appellant

13. Mr Rahman referred to the Judge's considerations why the Appellant's wife could not relocate to Bangladesh and reiterated that these did amount to insurmountable obstacles, especially when the evidence was that the wife's medical condition was being kept under review by her doctor. He boldly asserted that notwithstanding paragraph 52 of the decision removal of the child was not possible. Further, the Judge had not conducted any assessment of the proportionality of the original

decision. This appeared not to take account of paragraphs 46ff. of the Judge's decision leading to his finding at paragraph 64 on its proportionality.

Findings and consideration

14. The Judge found in favour of the Appellant in respect of his TOEIC certificate and consequently that he met suitability requirements of Appendix FM. He made a clear finding that the Appellant had failed to show that he met the financial requirements as indeed had been conceded for the Appellant: see paragraphs 46 and 63.

15. He assessed the best interests of the Appellant's child at paragraph 54 and properly went on to consider whether it was reasonable to expect the child to relocate to Bangladesh. The child's best interests are a primary but not determinative consideration. At paragraphs 62 and 63 the Judge gave a good reason why it would be appropriate for the Appellant to return to Bangladesh to seek entry clearance if his wife and child were to remain in the United Kingdom. This was in line with paragraph 51 of the sole judgment in *R (Agyarko) v SSHD [2017] UKSC 11* where Lord Reed found:-

> "… whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant – even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal …"

16. The Judge's decision is a carefully considered one in which he took account of the relevant factors both for and against the Appellant. The conclusion may be harsh for the Appellant and his family but on the evidence he was entitled to conclude it would not be unreasonable or unduly harsh to require the Appellant to return to Pakistan. The grounds for appeal essentially assert disagreement with the Judge and disclose no error of law. Consequently, the decision shall stand.

Post-hearing submissions

17. Following the hearing and having regard to the fact this decision had not been promulgated before the Supreme Court handed down judgement in KO and Others v SSHD [2018] UKSC 53, I gave the parties the opportunity to make written submissions on the judgment. Submissions were received for the Appellant but not for the Respondent.

18. The decision under appeal is a removal decision and so the references in the submissions to deportation in paragraphs 3-6 have little if any relevance.

19. The submissions note that in *SSHD v VM (Jamaica) [2017] EWCA Civ. 255* at paragraph 64 in the only reasoned judgment Sales LJ held that the presence of

children in the United Kingdom, including British citizens, did not, as a result of the operation of EU law, have to be treated as a fixed point for the purposes of the proportionality analysis under Article 8. They further note that at paragraph 44 of *KO* the Supreme Court affirmed such a view. The Judge dealt with the evidence about the possibility of relocation of the family at paragraph 61 of his decision and his understanding of the jurisprudence is confirmed by the later judgment in *TZ (Pakistan) v SSHD [2018] EWCA Civ.1109* in which the Senior President giving the only reasoned judgment found at paragraph 25 that:

> "The settled jurisprudence of the ECtHR is that it is likely to be only in an exceptional case that article 8 will necessitate a grant of leave to remain where a non-settled migrant has commenced family life in the UK at a time when his or her immigration status is precarious … Where precariousness success it affects the weight to be attached to family life in the balancing exercise. That is because article 8 does not guarantee a right to choose one's country of residence. Both the unlawfully overstay and the temporary migrant have no right to remain in the UK simply because they enter into a relationship with a British citizen during their unlawful or temporary stay …"

20. The Judge gave sustainable reasons for his conclusion on the Appellant's claim based on Article 8.

21. The Judge's decision is a carefully considered one in which he took account of the relevant factors both for and against the Appellant. The conclusion may be harsh for the Appellant and his family but it is not unreasonable or unduly harsh. Notwithstanding the numerous grounds on which permission to appeal was granted, I conclude that there is no material error of law in the Judge's decision such that it should be set aside. Accordingly, it shall stand.

Anonymity

17. There was no request for an anonymity direction and having considered the appeal I find none is warranted.

SUMMARY OF DECISION

The decision of the First-tier Tribunal did not contain an error of law and shall stand. The effect is that the appeal of the Appellant is dismissed.
No anonymity direction is made.

Signed/Official Crest Date 26. xi. 2018
Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal